Nos. 79-4, 79-5 and 79-491

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., et al.,
Appellants,

v.

DAVID ZBARAZ, M.D., et al.,
Appellees.

No. 79-5

JEFFREY MILLER,
Appellant,

v.

DAVID ZBARAZ, M.D., et al.,
Appellees.

No. 79-491

UNITED STATES OF AMERICA,
Appellant,

v.

DAVID ZBARAZ, M.D., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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Movants Cora McRae, et al., who are plaintiffs in McRae v. Califano, 76 Civ. 5698 (E.D.N.Y.),* hereby move for leave to

* See McRae v. Mathews, 421 F. Supp. 533 (S.D.N.Y. 1976), vacated and remanded, Califano v. McRae, (Footnote continued on following page)

file this brief amicus curiae in support of appellees' "Motion to Vacate in Part, to Dismiss in Part and to Affirm" in the above-captioned case.

Interest of Amici

Movants-amici include two nationwide classes of plaintiffs certified as follows:

(1) The class of pregnant or potentially pregnant women who are eligible for medical assistance provided under their state plans, who with their physicians have decided on abortions; for whom abortions are medically necessary; who have been, are or will be prevented or impeded in obtaining medical termination of their pregnancies by Public Law 94-439, Section 209, Public Law 95-205, Section 101,

(Footnote continued)
425 U.S. 1045, for further consideration in light of Beal v. Doe, 432 U.S. 438, 97 S. Ct. 2366 (1977), and Maher v. Roe, 432 U.S. 464 (1977).

and Public Law 95-480, Section 210.* The class includes women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teachings of their religion and/or the dictates of their conscience determined that an abortion is necessary; and

(2) The class of duly licensed and medicaid certified providers of abortional services to eligible women who are prevented or impeded from performing and/or certifying abortions for the class of women represented by the plaintiff women because of the lack of medicaid reimbursement (Memorandum and Order, dated January 29, 1979).

* The complaint has been amended by stipulation to include the continuing resolution P.L. 96-86, section 118, enacted October 12, 1979. This legislation expires November 20, 1979.

These nationwide classes are joined as plaintiffs by the Women's Division of the Board of Global Ministries of the United Methodist Church.

The McRae plaintiffs have challenged the constitutionality of the riders to the FY 1977 - FY 1980 Labor-HEW Appropriations legislation, popularly known as the Hyde Amendments.*

* These riders restrict federal funds for abortion to differing extents. The original FY 1977 rider, P.L. 94-439, Section 209, prohibited federal funding of abortion "except where the life of the mother would be endangered if the fetus were carried to term." The FY 1978 and 1979 riders expanded the exceptions to include "such medical procedures necessary for the victims of rape or incest, where such rape or incest has been reported promptly to a law enforcement agency or public health service, or . . . those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." P.L. 95-205, Section 101, and P.L. 95-480, Section 210. The continuing resolution, P.L. 96-86, Section 118, effective until November 20, 1979, differs from the FY 1979 version in that it eliminates funding for abortions undertaken to prevent "severe and long-lasting health damage. . . ."

Movants seek to file this brief as amici curiae in support of the Zbaraz appellees' "Motion to Vacate in Part" in order to underscore the impermissibility under Article III of deciding the constitutionality of the Hyde Amendment in this case. (See "Appelles' Motion to Vacate in Part, etc.," Point I.) Amici are concerned that the Zbaraz plaintiffs, who represent a narrower class and who never litigated the constitutionality of the federal riders, cannot properly or adequately represent their interests and that a decision on the Hyde Amendment in Zbaraz could adversely affect their interests.

Argument

The Zbaraz plaintiffs never challenged the Hyde Amendment. They submitted no evidence, no argument and requested no relief with respect to the federal riders. In this posture, the District Court declared

the Hyde Amendment unconstitutional only with great reluctance and did not enjoin it. Zbaraz v. Quern, 409 F. Supp. 1212, 1215 n. 3 (N.D.Ill. 1979).

By contrast, plaintiffs in McRae have made an extensive record, documenting nationwide implementation and impact of the Hyde Amendments and exploring in depth the Congressional history and purpose. This record consists of almost 5,000 pages of transcript and 500 separate exhibits. The briefs total approximately 700 pages. We are advised by the District Court (Dooling, J.) to expect a decision, which has been sub judice since December 4, 1978, on or about November 26, 1979. We anticipate that the decision will contain comprehensive findings of fact and conclusions of law on the issues of legality and constitutionality developed with respect to the Hyde Amendments.

Accordingly, to preserve the fundamental due process right not to be bound by a decision in a case which has not challenged the Hyde Amendments, the nationwide plaintiffs in McRae join appellees in urging the Court to vacate that portion of the District Court's opinion which declares the Hyde Amendment unconstitutional. Vacating this portion of the decision is required by Article III and protects against the miscarriage of justice which would result if an issue with such drastic and far-reaching consequences as the constitutionality of a nationwide restriction on medicaid abortions were to be decided in a case which did not challenge the federal statute. At the same time, amici urge the Court to grant appellees' motions as to the state medicaid restrictions in order to expedite relief for the many members of the amici classes whose entitlement to reimbursement for

medically necessary abortions is being presently curtailed by state rules which parallel the Illinois law at issue here.

Conclusion

Wherefore, appellees' motion should be granted.

Respectfully submitted,

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